# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1976

No. 76-521

NATHAN S. SMITH,
*Petitioner,*

vs.

ARTHUR R. GRIMM and JEANNINE GRIMM,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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## for the Ninth Circuit

The petitioner Nathan S. Smith respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 13, 1976, in these proceedings.

### OPINIONS BELOW

The opinion of the Ninth Circuit as to which review is sought is dated April 13, 1976. It is reported at 534 F.2d 1346 and is reprinted in Appendix A hereto *infra*.

Various judgments and orders of the United States District Court for the Northern District of California, dated April 8, 1974, February 27, 1974, April 24, 1973 and September 7, 1976, are unreported; they are reprinted in Appendices C through G, *infra*.

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**JURISDICTION**

The petitioner, a practicing attorney, sued the respondents and the Commanding Officer of the Air Force Accounting and Finance Center for declaratory and injunctive relief with respect to certain salary and retirement payments that the Air Force was to pay to the respondent Arthur R. Grimm. The petitioner alleged that he had an equitable lien on fifty percent of the payments due Grimm, arising out of legal services he performed for Grimm. Jurisdiction was alleged under 28 U.S.C. §§1331, 1361 and 2201.

On April 8, 1974, the District Court awarded the petitioner recovery of fifty percent of the payments due from the Air Force, as requested. See Appendix C, *infra*. The respondents Grimm filed a notice of appeal to the Ninth Circuit, but the Air Force (which had participated in the District Court proceedings) filed no notice of appeal and took no part in the Ninth Circuit proceedings.

On April 13, 1976, the Ninth Circuit reversed the District Court's holding and remanded with instructions to dismiss the complaint because of a lack of federal jurisdiction. 534 F.2d 1346. A timely-filed



petition for rehearing and rehearing en banc was denied on May 19, 1976. See Appendix B, *infra*. That order, however, stated that nothing therein was "intended to preclude such amendment of allegations of federal jurisdiction as the trial court may deem proper."

The petitioner promptly filed in the District Court a motion to amend his complaint, alleging several additional sources of federal jurisdiction such as 37 U.S.C. §701(a) and 5 U.S.C. §§701-703 (the Administrative Procedure Act.). On September 7, 1976, the District Court denied the motion to amend and dismissed the action. See Appendices F and G, *infra*. On September 20, 1976, the petitioner duly filed a notice of appeal to the Ninth Circuit from that District Court ruling.

In the meantime, the petitioner filed a timely application for an extension of time in which to file this petition for certiorari, in the hope that the District Court's action on the motion to amend would either make certiorari unnecessary or could be incorporated within the instant petition (with or without any action by the Ninth Circuit on an appeal therefrom). On July 28, 1976, the Chief Justice signed an order extending the time for filing this petition for certiorari to and including October 16, 1976. This petition has been filed within that extended period.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether a suit to impress an attorney's equitable lien on federal funds held by federal officers, to be paid to a client whose claim to such funds has been sustained by federal courts, involves a federal question so as to come within the jurisdiction given federal district courts by 28 U.S.C. §1331(a).

2. Whether a suit to compel or mandamus such federal officers to make payments from federal funds to a court-appointed receiver, in satisfaction of the adjudicated rights of the claimant and his attorney, comes within the federal officer mandamus jurisdiction of federal district courts, 28 U.S.C. §1361.

3. Whether a federal court of appeals can *sua sponte* determine that a federal officer is entitled to the defense of sovereign immunity where (a) that officer never seriously pressed such a defense before the District Court, (b) that officer did not appeal from the judgment in question, (c) the private appellant has no standing to assert such a defense, and (d) the defense has been rejected by this Court in a prior case involving substantially identical facts.

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## STATUTES INVOLVED

*28 U.S.C. §1331(a):*

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.



*28 U.S.C. §1361:*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

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*28 U.S.C. §2201:*

In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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*37 U.S.C. §701(a):*

Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

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*5 U.S.C. §702 (Administrative Procedure Act):*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

action within the meaning of a relevant statute, is entitled to judicial review thereof.

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*5 U.S.C. §703 (Administrative Procedure Act):*

The form of proceeding for judicial review is . . . any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. . . .

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**STATEMENT OF THE CASE**

The relevant facts in this case are uncomplicated and uncontested.

In 1963, after nearly 18 years of service as a commissioned officer, the respondent Arthur R. Grimm was discharged from the Air Force. Grimm retained the petitioner, an attorney, to contest the legality of the discharge. A contingent fee contract was entered into, whereby Grimm agreed to pay petitioner "50% of any and all amounts recovered by [Grimm] as a direct or indirect result of the action."[1] It was further agreed that this contingent fee contract "constitutes an assignment pro tanto to [petitioner] of said claim insofar as is lawful and of anything received or collected thereon and of any judgment or judgments obtained thereon." See Appendix E, *infra.*

[1]The respondent Jeannine Grimm, the wife of Arthur R. Grimm, was also a party to this agreement.



The petitioner was successful in his representation of Grimm. The discharge was declared null and void by the District Court, a declaration affirmed by the Ninth Circuit. *Grimm v. Brown,* 291 F. Supp. 1011 (N.D.Cal. 1968), aff'd, 449 F. 2d 654 (9th Cir. 1971). In so affirming, the Ninth Circuit concluded that Grimm "is entitled to all of the emoluments of his position as an Air Force officer until he is validly discharged after a fair and impartial hearing." 449 F. 2d at 656.

Shortly after the favorable District Court decision, the petitioner filed a suit in the Court of Claims on Grimm's behalf to recover the pay and allowances due Grimm. In March of 1972, the petitioner received a settlement offer from the Department of Justice, but the offer was rejected by Grimm. An application was then filed by Grimm with the Air Force Board for Correction of Military Records, seeking promotions and other relief. The Board ruled that Grimm was entitled to back pay and retirement pay as set forth in the settlement offer of March, 1972. The retirement pay was in excess of $500 a month for life.

Shortly thereafter the Grimms repudiated the contingent fee contract and began to conceal from petitioner their receipt of funds from the Air Force. The petitioner has received no compensation for his legal services under the contract except for $1,150.[2] The petitioner duly filed with the Secretary of the Air Force a copy of the contingent fee contract, which

[2]The parties stipulated that this was the amount Grimm paid petitioner from other funds.

by its terms constituted an assignment to the petitioner of one-half of any and all payments from the Air Force to Grimm. The Air Force Accounting and Finance Center, in response, notified petitioner that it would consider the assignment prior to paying Grimm any back pay or allowances. But despite that notification and without any notice to petitioner, the Air Force Accounting and Finance Center sent Grimm a voucher for $3,000 on October 11, 1972, in partial payment of Grimm's back pay claims, with the statement that additional vouchers would be sent to Grimm within the next week or ten days. The petitioner received no part of that $3,000 payment.

The petitioner did not learn of the October 11 payment until he made a telephone inquiry of the Air Force on November 6, 1972. Two days later he filed a complaint in the District Court below in the instant proceeding. Named as defendants were (1) the Commanding Officer of the Air Force Accounting and Finance Center, (2) the respondent Arthur R. Grimm, and (3) the respondent Jeannine Grimm. The first paragraph of the complaint asserted that this was "an action for declaratory relief, for appointment of a receiver and for injunctive relief." Jurisdiction was said to be conferred by 28 U.S.C. §1331 (federal question), 28 U.S.C. §1361 (mandamus to compel a federal officer to perform his duties), and 28 U.S.C. §2201 (Declaratory Judgment Act).[3]

[3]Following the decision below by the Ninth Circuit, petitioner sought to amend his complaint by alleging jurisdiction under (1) 28 U.S.C. §1331 since his claim arose under the due process and just compensation clauses of the Fifth Amendment and under 37 U.S.C. §701(a), (2) the Administrative Procedure Act, 5 U.S.C. §§701-703, and (3) 28 U.S.C. §1361, mandamus jurisdiction based on alleged duties owed by the government defendant to petitioner under the Fifth Amendment and 37 U.S.C. §701(a). The latter section, §701(a), provides that, under regulations prescribed by the Secretary of the Air Force, a commissioned officer of the Air Force "may transfer or assign his pay account, when due and payable." The District Court denied leave to make such amendments. See Appendix G, *infra*.



The complaint sought the following relief against the named defendants: (1) an order confirming the assignment and declaring the existence of an equitable lien in petitioner's favor; (2) an immediate order appointing a receiver to receive and hold all sums payable to the Grimms by the Air Force; (3) an immediate and permanent order preventing the Air Force from making any further payments to the Grimms; and (4) an injunction requiring the Commanding Officer of the Air Force Accounting and Finance Center "to deliver all checks (or other payments in whatever form) representing Air Force payments to Grimm and/or his wife to the receiver of this Court."

The Commanding Officer thereupon filed a motion to dismiss on the sole ground that the petitioner's claim was barred by the Anti-Assignment Act, 31 U.S.C. §203.[4] That motion was implicitly denied, on December 15, 1972, when the District Court entered a preliminary injunction preventing the Air Force from sending further funds to the Grimms. The Dis-

[4]The Anti-Assignment Act provides that all assignments made of any claim against the United States are null and void unless freely made in the presence of witnesses, after the allowance of such a claim and the ascertainment of the amount due. Cf. 37 U.S.C. §701(a), allowing commissioned Air Force officers to assign their pay accounts when due and payable.

trict Court subsequently denied a motion by the Grimms to dismiss the action for lack of federal jurisdiction. The Commanding Officer had appealed to the Ninth Circuit from the judgment of preliminary injunction. The District Court accordingly denied the Grimms' motion to dismiss partly on the basis of lack of jurisdiction "pending a decision by the Ninth Circuit of the Commanding Officer's appeal." See Appendix E, *infra*. But that decision was never rendered by the Ninth Circuit, inasmuch as the Commanding Officer withdrew his appeal on May 16, 1973.

The case was tried before the Court without a jury, and with defendant Commanding Officer making no appearance either in person or by counsel. Thereafter, on February 27, 1974, the District Court determined that the petitioner was entitled to recover one-half of the back pay awarded to Grimm, plus one-half of the retirement pay Grimm was entitled to receive. The court found that while the terms of the underlying agreement "may be harsh they are not unconscionable and must be enforced." As the Ninth Circuit recognized, the District Court implicitly found that petitioner had substantially performed his duties under the contract. See Appendix D, *infra*. The court accordingly decreed that the petitioner "has an equitable lien on and is entitled to recover" the amounts due under the contract. Grimm was ordered to instruct the Commanding Officer of the Air Force Accounting and Finance Center to forward all payments for his account to a court-designated bank, one-half of which were then to be disbursed by the bank to the petitioner. See Appendix C, *infra*. The United States Attorney in effect stipulated to this judgment by stating "This matter can be resolved simply by having the judgment order the payee Arthur R. Grimm to instruct the Air Force to make payments to the Bank of California as suggested in plaintiff's Form of Judgment."



The Commanding Officer did not appeal from this judgment, and in no other way pursued any jurisdictional objections to the entry of such an order. The Grimms did appeal, but limited their contentions to the arguments that the contract was unconscionable and that the petitioner had not fully performed thereunder. No jurisdictional objections were raised on the appeal by the Grimms.

The question of federal jurisdiction was first raised by the Ninth Circuit *sua sponte* during the oral argument of the Grimms' appeal. The court requested the submission of supplementary briefs on that issue, which was to become the sole matter adjudicated on the appeal. Not having appealed or otherwise participated in the proceedings before the Ninth Circuit, the Commanding Officer made no jurisdictional claims and submitted no brief to the court. In the District Court, the Commanding Officer did not assert the defense of sovereign immunity (except for a minor reference to it in a post-trial memorandum) and the District Court made no reference to it as an issue. Appendices D and E, *infra*. At no point in his pretrial motion to dismiss or in his aborted appeal from the preliminary injunction did the Commanding Officer

raise the defense of sovereign immunity or even mention it.

The Ninth Circuit held that the petitioner's action in asserting an equitable lien was founded on state law and thus involved no federal question justifying the assertion of jurisdiction under 28 U.S.C. §1331(a). The action was likewise held not to be within the mandamus jurisdiction of the federal courts, 28 U.S.C. §1361, since it did not seek to compel the performance of a duty by a federal officer. And, quite gratuitously, the Ninth Circuit held that the action was barred by the sovereign immunity doctrine, the United States not having consented to the suit.

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## REASONS FOR GRANTING THE WRIT

The Ninth Circuit has closed the doors of the federal courts to attorneys who seek to collect their fees for having successfully prosecuted their clients' financial claims against the United States. In so doing, the Ninth Circuit has created new and perplexing problems in the complex area of federal court jurisdiction. And it has rendered a decision that in critical respects contradicts the principles established by this Court in *Houston v. Ormes,* 252 U.S. 469 (1920).

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### 1. FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. §1331(a)

The Ninth Circuit, by completely misjudging the nature of the federal question underlying petitioner's



complaint, has injected unfortunate confusion into 28 U.S.C. §1331(a). It has cast the assertion of an attorney's equitable lien—which concededly is rooted in local California law—in the role of petitioner's main claim. It has subordinated the totally federal context in which this claim was asserted—*i.e.,* a claim against federal funds held by federal officers to satisfy a judicially approved judgment against the United States. It has, in other words, put the state law cart before the federal jurisdictional horse, and thus has confounded the judicial duty to formulate properly the "distinction between controversies that are basic and those that are collateral." *Gully v. First National Bank in Meridian,* 299 U.S. 109, 118 (1936).

This Court's decision in *Houston v. Ormes,* 252 U.S. at 473, reveals how far the Ninth Circuit missed the mark in identifying the federal question. *Houston* was a case virtually on all factual fours with the instant proceeding.[5] And it teaches that the core of any such effort to enforce an attorney's equitable lien is the compelling of federal officers to perform the ministerial function of disbursing federal funds in their possession to the rightful claimants. That effort is necessarily federal in nature, particularly

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[5] *Houston,* like the instant case, involved a suit against federal officers to establish an equitable lien for attorney's fees upon a fund held by those officers for payment of the client's claim against the United States. That claim had been found due after the proceedings in the Court of Claims, in which the attorney had successfully represented the client. The attorney then sought relief in the District Court of the District of Columbia by way of an injunction and the appointment of a receiver to receive payment from the federal officers and to disburse the fund to the client and the attorney.

where the funds were created or appropriated to satisfy some federal claim of the attorney's client. In that situation, *Houston* means that the state-created equitable lien becomes collateral to the administration and disbursement of the federal funds.

True, *Houston* did not put its ruling in federal jurisdictional terms. It did not need to, for the Court found it sufficient that the general equitable jurisdiction of the District Court for the District of Columbia had there been invoked, a jurisdiction analogous to the equitable jurisdiction of a state court. But in 1920, when *Houston* was decided, federal courts in the District of Columbia possessed both federal and local jurisdiction; thus it was often unnecessary to resolve jurisdictional matters in federal court terms. Such courts in the District have lost their local jurisdiction (see the District of Columbia Court Reform Act of 1970, 88 Stat. 437). Thus is raised a question as to the present impact of *Houston v. Ormes* on the federal court sector and such current federal jurisdictional statutes as §1331(a).[6]

Nevertheless, if the *Houston* rationale is followed, it would seem to dictate that, when the equitable jurisdiction of federal courts is invoked under §1331(a) in such circumstances, the federal question is to be found not in the assertion of an equitable lien but in the attempt to compel federal officers to perform their federal ministerial function of properly

[6]The *Houston* ruling, while seldom cited by this Court, has never been repudiated or limited. It was followed and approved in *Mellon v. Orinoco Iron Co.*, 266 U.S. 121 (1924).



disbursing federal funds in their control.[7] And because the representation of claimants against the United States is such a widespread practice, it becomes important to have a definitive determination of the extent to which attorneys may utilize §1331(a) to impress their equitable liens upon federal funds.

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### 2. MANDAMUS JURISDICTION UNDER 28 U.S.C. §1361

The Ninth Circuit held that jurisdiction could not rest on the federal officer mandamus statute, §1361, since the claim against the public officer "must be clear and certain and the duty of the officer ministerial." The complaint in this case was said to allege no duty owed by the Air Force to the petitioner.

Here again, *Houston v. Ormes* contradicts the Ninth Circuit's analysis of the mandamus statute. In *Houston,* this Court ruled that payment of the attorney's fees from the fund in the possession of the federal officers was properly deemed "a ministerial duty, the performance of which could be compelled by mandamus." 252 U.S. at 473. And it is a "necessary consequence," to paraphrase the *Houston* ruling, that the petitioner—who has an equitable right in the Air Force funds as against the Grimms—"may have

[7]The problem of whether the Anti-Assignment Act bars the assignment of any part of the claim against the Government is irrelevant to a determination of the District Court's jurisdiction under either §1331(a) or §1361. In any event, as *Houston v. Ormes* held, that Act "does not stand in the way of giving effect to an assignment by operation of law after the claim has been allowed." 252 U.S. at 474.

relief against the officials of the [Air Force] through a mandatory writ of injunction, or a receivership, which is its equivalent, making [the Grimms parties so as to bind them], and so that the decree may afford a proper acquittance to the government."

The fact, as noted by the Ninth Circuit, that the District Court decree required no "material performance" from the Air Force does not detract from the jurisdictional applicability of §1361. A federal court has wide discretion in fashioning appropriate remedies of an equitable nature. It is enough if the court's jurisdiction has been properly invoked.[8]

Certiorari thus becomes appropriate to correct what appears to be a manifest distortion of the §1361 mandamus provision. No decision by this Court since the 1920 ruling in *Houston* has dimmed the mandamus facet of that ruling.

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### 3. THE NINTH CIRCUIT'S INVOCATION OF THE SOVEREIGN IMMUNITY DOCTRINE

The gratuitous ruling of the Ninth Circuit (see footnotes 6 and 9 of the opinion below) that there is "no path around the bar of sovereign immunity" in this case creates several important problems in the administration of this ancient doctrine.

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[8]See also *Littell v. Morton*, 445 F.2d 1207, 1210 (4th Cir. 1971), holding that where an attorney sues the Secretary of the Interior for, *inter alia*, a contingent fee based on his contract with an Indian tribe, "mandamus was sufficient to obtain judicial review of the Secretary's determination under the APA, 5 U.S.C.A. §703." Section 703 was one of the additional jurisdictional statutes which petitioner sought to add to his complaint.



To begin with, the court's invocation of this doctrine, which assumes that the judgment sought would expend itself on the public treasury or interfere with the public administration, *Land v. Dollar,* 330 U.S. 731, 738 (1947), is totally inconsistent with the court's major premise that the petitioner made no claim against the Air Force. If petitioner's claim does expend itself on the federal treasury, then federal jurisdiction under §1331(a) would indeed become clear. But on the court's own premises, why invoke sovereign immunity as to a claim not made, or as to a claim that the court has found to be outside the jurisdiction of the federal courts? And, if petitioner is to be remanded to whatever remedies he may have in the state courts, why should those remedies be prejudiced or rendered worthless by a gratuitous ruling that sovereign immunity protects the Air Force from any judicial scrutiny?[9]

Moreover, the United States in its representation of the Air Force did not even mention the defense of sovereign immunity until after the case had been tried in the District Court. The United States has yet to claim that the federal treasury would be unduly invaded were petitioner's claim to be recognized, or that the administration of public

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[9]At the same time, the enforcement of an equitable lien against federal funds in the hands of federal officers is a function more properly in the hands of federal courts than of state courts. State courts might have jurisdictional difficulty in controlling the distribution of federal funds. See *Tarble's Case,* 80 U.S. 397 (1872), holding that state courts have no jurisdiction to issue habeas corpus writs for those in the custody of the United States Army.

funds would be embarrassed were an equitable lien to be attached. See *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949). Indeed, the United States has not even seen fit to appeal from a judgment that imposed just such a lien.

That failure to appeal raises the question whether the Ninth Circuit can impose and adjudicate a defense which was applicable only to a party not before the court, which was never seriously pressed even in the District Court, and which was in effect abandoned there. While sovereign immunity partakes of jurisdiction, it may not be the type of jurisdictional matter that can be raised *sua sponte* by a court, at least in the absence of some proof of a "substantial bothersome interference with the operation of government." See *Littell v. Morton,* 445 F.2d 1207, 1214 (4th Cir. 1971). And the court certainly should not be allowed to raise that defense for the benefit of the non-governmental parties who were before the court on the appeal (the Grimms). Those parties should in no event be allowed to lay claim to, or benefit from, the rights or defenses of a third party not before the court. See *Barrows v. Jackson,* 346 U.S. 249, 255-259 (1953).

Finally, the "principal contention" advanced and rejected in *Houston v. Ormes* is precisely the one put forward here by the Ninth Circuit. That contention was that "because the object of the suit and the effect of the decree were to control the action of the appellants in the performance of their official duties the suit was in effect one against the United States." 252



U.S. at 472. Sovereign immunity was not applicable, said the *Houston* Court, because the federal officers "are charged with the ministerial duty to make payment on demand to the person designated" and "in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government." 252 U.S. at 472. To the same effect is *Miguel v. McCarl,* 291 U.S. 442 (1934); *Smith v. Jackson,* 246 U.S. 388 (1918); *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838); *Morgenthau v. Fidelity & Deposit Co.,* 94 F.2d 632 (D.C.Cir. 1937).

While the Ninth Circuit's ruling as to the availability of the sovereign immunity defense was an alternative ground of decision, the impact and significance of that ruling are in no way diluted. The gratuitous ruling on this issue, which is so at odds with the concepts of proper judicial administration, deserves full review by this Court.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. While petitioner's appeal from the District Court's refusal to permit amendments to the complaint is pending before the Ninth Circuit, that appeal is not designed to change or alter any of the critical rulings rendered by the Ninth Circuit in the opinion below. Those rulings are now the law of this case, unless and until this Court otherwise determines.

Dated, October 11, 1976.

Respectfully submitted,

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**(Appendices Follow)**

# APPENDICES

## Appendix A

United States Court of Appeals
for the Ninth Circuit

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|---|---|
| Nathan S. Smith, Plaintiff-Appellee, vs. Arthur R. Grimm and Jeannine Grimm, Defendants-Appellants. | No. 74-2310 OPINION |

[April 13, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and SNEED, Circuit Judges, and SMITH,* District Judge

SNEED, Circuit Judge:

Plaintiff Smith sued the Commanding Officer, Air Force Accounting and Finance Center (the "Air Force") and defendant Grimm[1] for declaratory and injunctive relief with respect to certain salary and retirement payments that the Air Force was to pay to Grimm. Smith alleged that he had an equitable lien, arising out of legal services performed by him for Grimm, on fifty percent of military pay due to

*The Honorable Russell E. Smith, United States District Judge, for the District of Montana, sitting by designation.

[1]Grimm's wife is also named as a defendant.

Grimm. The trial judge, sitting without a jury, ruled in Smith's favor. Grimm's appeals,[2] alleging the unconscionability of the contract with Smith, and Smith's lack of performance thereof. We are unable to reach these issues inasmuch as we find that there is no federal jurisdiction to entertain this lawsuit.

I. *Statement of Facts.*

A comprehension of the factual background is necessary to adequately analyze the jurisdictional posture of this case. In 1963, after approximately eighteen years of service, Captain Grimm was discharged from the Air Force by the Secretary of the Air Force pursuant to the recommendation of a Board of Inquiry. Grimm retained Smith, an attorney, to contest the legality of that discharge. Arising out of this representation, and principally at issue below, was a contingent fee contract between Smith and Grimm whereby Grimm agreed to pay Smith "50% of any and all amounts recovered by [Grimm] as a direct or indirect result of the action."

Smith was successful in his representation, and had the discharge declared null and void. *Grimm v. Brown,* 291 F. Supp. 1011 (N.D. Cal. 1968), *aff'd,* 449 F.2d 654 (9th Cir. 1971). After the district court decision, Grimm filed suit in the Court of Claims seeking to recover back pay. After the Ninth Circuit affirmance of the district court, there was a dispute and the parties parted ways. The Air Force paid

[2]The Air Force has not appealed.



Grimm approximately $3,000 of back pay; Grimm did not pay Smith one-half of this amount. Smith then filed the instant lawsuit.

The district judge found that under the contract Smith was entitled to recover fifty percent of the military pay due Grimm, including future retirement pay. In so doing, the district judge found that the contingent fee contract was not unconscionable, and (implicitly at least) that Smith had substantially performed under it. The Judgment did not require any material performance from the Air Force, but merely ordered Grimm to direct the Air Force to henceforth send his retirement payments to a bank custodial account, from which Smith would automatically be paid fifty percent.[3]

[3]The Judgment provided, in pertinent part:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Arthur R. Grimm instruct the Commanding Officer, United States Air Force Accounting and Finance Center (or any Finance and Accounting Office of the United States which may subsequently be responsible for disbursing moneys to Defendant Arthur R. Grimm) by registered mail, that henceforth, any payments for his account shall be forwarded directly to:

The Bank of California, N.A.
Collection Exchange Department
P.O. Box 45000
San Francisco, California 94145

who shall be, and hereby is, authorized and designated to endorse the payee's name on any such check, draft, voucher, warrant or other evidence of indebtedness; who shall be kept apprised of the gross amount of the monthly retirement pay of a captain in the United States Air Force retired with 20 years service; who shall on a monthly basis immediately upon receipt of a check, draft, etc., forthwith disburse to Nathan S. Smith fifty percent (50%) of such gross amount and to the payee named thereon the balance.

II. *Federal Jurisdiction.*

At bottom, this is a simple contract dispute between Smith and Grimm. Smith wants to collect his contingent fee; Grimm defends upon the grounds of unconscionability and nonperformance. These issues of state law predominate. The role of the Air Force in this case is merely that of the contract debtor.

The district judge did not deny a motion to dismiss made by Grimm based upon lack of subject matter jurisdiction. However, his reasoning was substantially influenced by the fact that, at that time, there was an appeal in this case by the Air Force which was pending before this court. Since that appeal also raised the issue of federal jurisdiction, the district judge denied Grimm's motion "pending a decision by the Ninth Circuit." (R. 123). The Air Force's appeal was subsequently dismissed by stipulation of the parties under FED. R. APP. P. 42(b), so this court has not heretofore decided that jurisdictional question.

The state law focus of the case and the lack of any apparent material nexus between the underlying dispute and federal law, coupled with the district judge's initial reliance upon a non-forthcoming resolution from this court, convinced us that a critical appraisal of the federal jurisdiction of this case was warranted.[4] This analysis leads us to conclude that there is no valid federal jurisdictional basis for this case. The complaint alleges two bases of federal jurisdiction,

[4]A federal appellate court may review subject matter jurisdiction even if not raised below. Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884).



federal question, 28 U.S.C. § 1331(a), and mandamus, 28 U.S.C. § 1361.[5] There is no allegation of diversity, and it appears from the record that both Smith and Grimm are California residents. We turn first to the issue whether federal question jurisdiction exists.

A. *Federal Question.*

Section 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

The issue of what "arises under the Constitution, laws, or treaties of the United States" is one which the courts have grappled without being able to formulate a precise definition. Indeed, the task of determining whether a particular case "arises under" a federal law has been termed by a leading commentator as "the most difficult single problem in determining whether the federal jurisdiction exists." C. WRIGHT, A. MILLER & E. COOPER, 13 FEDERAL PRACTICE AND PROCEDURE, 397 (1975).

Given the predominate position of the federal government in our present society and the burgeoning of federal regulation, we are not surprised when even the most "local" lawsuit is tangentially related to a

[5]The complaint also alleges jurisdiction based upon the Declaratory Judgment Act, 28 U.S.C. § 2201. The Declaratory Judgment Act does not confer an independent jurisdictional basis. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

federal law. However, such a relation to a federal law is not sufficient for section 1331(a) jurisdiction unless the lawsuit "really and substantially involves a dispute or controversy respecting the validity, construction, or effect . . ." of the federal law. *Shulthis v. McDougal,* 225 U.S. 561, 569 (1912). In analyzing the nexus between a claim and federal law, we are mindful of the admonition of Justice Cardozo, speaking for the Court in 1936, in words even more appropriate for 1976:

> If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by. *Gully v. First National Bank in Meridian,* 299 U.S. 109, 118 (1936).

Furthermore, the federal law must be a direct and essential element of the plaintiff's cause of action. *Id.* at 112. And even if there is a federal question presented, that federal question must be "substantial." *Hagans v. Lavine,* 415 U.S. 528, 536 (1974).

Before analyzing this case under these rather broad standards, we note that the federal question must be an essential element appearing on the face of the complaint. *Gully, supra* at 112-13. The federal question



may not be inferred from a defense or anticipated defense. *Phillips Petroleum v. Texaco,* 415 U.S. 125, 127-28 (1974).

We now examine the plaintiff's complaint herein. The complaint initially alleges the factual background with respect to the contract and the subsequent $3,000 payment by the Air Force to Grimm. The complaint then alleges that there is no adequate remedy at law (principally because Grimm was insolvent, had numerous creditors, and refused to pay Smith), and asks for the declaration of an equitable lien, the appointment of a temporary receiver for the funds, and an injunction requiring the moneys to be paid to the receiver.

Nowhere does the complaint allege that any federal statute or constitutional provision is the basis for this cause of action. Indeed, there is no mention of any federal law, statute, or constitutional provision (other than allegation under the jurisdictional sections, 28 U.S.C. §§ 1331(a), 1361 and 2201). The Air Force is mentioned throughout, but only in its role as Grimm's former employer and present debtor.

The litigation below did involve the construction and effect of a federal statute, the "Anti-Assignment Act," 31 U.S.C. § 203. This section provides certain procedural safeguards so that, *inter alia,* the Government can be sure of the validity of the assignment of a claim against the Government, and renders null and void any attempted assignment of a claim against the Government that does not comply with its procedures. Smith had notified the Air Force of an assign-

ment to him of the contract (complaint, exhibit "C") and the Air Force had raised the issue of the Anti-Assignment Act (complaint, exhibit "D"). The question of whether an equitable lien, arising from a contract with an attorney, is a "transfer by operation of law" and therefore an exception to the Anti-Assignment Act was extensively briefed below by the Air Force and by Smith. However, this statute does not appear in the complaint, and cannot serve as a basis for jurisdiction since it is clearly collateral to Smith's claim. *Gully, supra.* The existence by virtue of a federal statute of a formal impediment to recognition of the plaintiff's claim grounded in state law does not provide federal question jurisdiction. *Cf. Phillips Petroleum Co. v. Texaco, Inc., supra.*

Although it is true that the term "laws" within the meaning of section 1331(a), includes federal common law, *Illinois v. City of Milwaukee,* 406 U.S. 91, 99-100 (1972), Smith's claim of the existence of an equitable lien does not provide federal question jurisdiction herein for several reasons. It is state law, not federal common law, that determines the existence of an equitable lien under the circumstances of this case. *Cf. In re Freeman,* 489 F.2d 431 (9th Cir. 1973) (bankrupt's assignment of income tax proceeds void against United States under 31 U.S.C. § 203, but not void as between parties, and local law determines the validity of assignment of future right); *Danning v. Mintz,* 367 F.2d 304 (9th Cir. 1966) (validity of assignment as affects the rights of the assignor and assignee *inter se* a matter of local law, noncompliance with 31 U.S.C. § 203 notwithstanding); *In re Italian Cook Oil Corp.,*



190 F.2d 994 (3rd Cir. 1951); (effectiveness of assignment governed by local law). Indeed, plaintiff Smith's memorandum of law prepared in the proceedings below recognized this: "California law creates an equitable line in favor of Smith under such a contract . . ." (citing California cases) (R. 43-44); ". . . in the case at bar the lien arises under California decisional law." (R. 49). Furthermore, defenses to the existence of the equitable lien arising out of the contract—unconscionability and non-performance—are also issues of California law, and were briefed and argued as such below.

As already indicated, the fact that the provisions of the federal Anti-Assignment Act may be avoided by reason of an equitable lien created by local law in connection with a claim rooted in local law does not mean that such claim "arises under the Constitution, laws, or treaties of the United States." Any federal question is too attenuated or collateral to provide jurisdiction.[6] *See, Louisville & Nashville Railroad v. Motley,* 211 U.S. 149 (1908).

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[6]Furthermore, even assuming that the attempt to enjoin the Air Force from paying directly to Grimm involves a federal question, we see no path around the bar of sovereign immunity. Suits nominally against government officers may in reality be against the sovereign. Dugan v. Rank, 372 U.S. 609 (1963). As the Court said in *Dugan:*

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar,* 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic & Foreign Corp., supra,* at 704; *Ex parte New York,* 256 U.S. 490, 502 (1921). *Id.* at 620.

The complaint does not allege, nor do we perceive, actions by the government officer which would fall within the two exceptions to

B. *Mandamus.*

In 1962 Congress added section 1361 to Title 28 of the United States Code:

> § 1361. *Action to compel an officer of the United States to perform his duty.*
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Mandamus jurisdiction, we believe, fails on several counts.

This court has recently held that mandamus is traditionally proper only to command an official to perform an act which is a positive command and so plainly prescribed as to be free from doubt. The claim must be clear and certain and the duty of the officer ministerial. *Jarrett v. Resor,* 426 F.2d 213, 216 (9th Cir. 1970); *United States v. Walker,* 409 F.2d 477, 481 (9th Cir. 1969). *See also, Wilbur v. United States ex rel. Kadrie,* 281 U.S. 206, 218-19 (1930).

It is true that in very recent cases we have interpreted the "clear and free from doubt" standard to permit mandamus to compel compliance with the constitutional requirements of due process. *See, Knuckles v. Weinberger,* 511 F.2d 1221 (9th Cir. 1975) (due

this rule: (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." *Id.* at 621-22. The United States has not consented to be sued herein, and this lack of consent is a jurisdictional defect which may be raised at any time. WRIGHT, MILLER & COOPER, *supra,* Vol. 14, pp. 156-57. *Cf.* Roberts v. United States, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070 (1974).



process challenge to summary curtailment of social security benefits); *Workman v. Mitchell,* 502 F.2d 1201 (9th Cir. 1974) (due process challenge to regulations governing prison discipline).[7] However, in neither case did we cast doubt on the authority of *Jarrett.* In *Knuckles,* we noted that *Jarrett* did not involve an attack on a procedure as unconstitutional on its face. 511 F.2d at 1222. In *Workman* we approved of the holding in *Jarrett* and distinguished it in language relevant to the instant case:

> Thus, mandamus jurisdiction was improperly invoked in that case [*Jarrett*] because there was no allegation that defendants had failed to perform any ministerial duty, be it established by regulation, statute or constitutional provision. Here [*Workman*], however, the complaint clearly alleges that the disciplinary regulations adopted by the defendants, governing the procedures to be followed in imposing prison discipline, fail to comply with the requirements of due process. The district court does have jurisdiction under the mandamus statute to compel such compliance. 502 F.2d at 1206.

The complaint in the instant case alleges no duty—constitutional or otherwise—owed by the Air Force to the plaintiff. Nor does the judgment seek to force an officer of the United States to do anything.[8] A com-

[7] *See also,* Elliott v. Weinberger, No. 74-1611 (9th Cir. October 1, 1975).

[8] The judgment rendered in this case required Grimm to have his pay paid to a bank custodial account and to instruct the bank to pay Smith fifty percent thereof. This judgment did not enjoin or compel any action by the Air Force (other than the normal monthly disbursement of the monthly retirement payments, albeit to a bank), and could have been rendered by the California state courts.

plaint that fails to allege a duty owed by the officer to the plaintiff or a violation of the officer of any such duty is plainly insufficient to bestow mandamus jurisdiction.

Nor does the federal officer's duty become clear, certain, and free from doubt when we infer from the complaint an allegation of a duty to recognize Smith's purported equitable lien. To recognize the lien the officer must first determine its validity under state law and the effect of the Anti-Assignment Act, as well as ascertain the extent to which Grimm has satisfied Smith's claims from other funds. To hold that these uncertainties can be removed by their adjudication and that, as a consequence, what originally was obscure is now clear, certain, and free from doubt would be contrary to *Jarrett* and extend the *Knuckles-Workman* interpretation far beyond its reasonable limits. In sum, this situation is not one in which extraordinary writ of mandamus will issue.[9]

Therefore, we reverse the holding of the district court and remand with instructions to dismiss the complaint because of a lack of federal jurisdiction.

REVERSED and REMANDED.

[9]We once again note the bar of sovereign immunity as an additional impediment to plaintiff's allegation of mandamus jurisdiction. *See generally* footnote 6, *supra*. The mandamus statute, 28 U.S.C. § 1361, is not a consent to suit by the sovereign. White v. Administrator of General Services Administration, 343 F.2d 444 (9th Cir. 1965). *See* United States v. Transocean Air Lines, Inc., 386 F.2d 79, 81 (5th Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) (judgment against the United States due to an attorney's lien held barred by sovereign immunity).



## Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-2310

Nathan S. Smith,
Plaintiff-Appellee,
vs.
Arthur R. Grimm and Jeannine Grimm,
Defendant-Appellants.

[Filed May 19, 1976]

ORDER

Before: CHAMBERS and SNEED, Circuit Judges, and SMITH,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Chambers and Sneed have voted to reject the suggestion for a rehearing en banc, and Judge Smith has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. R. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Nothing in this Order is intended to preclude such amendment of allegations of federal jurisdiction as the trial court may deem proper. Rule 5(a) Fed. R. Civ. P.; 28 U.S.C. § 1653.

*The Honorable Russell E. Smith, United States District Judge, for the District of Montana, sitting by designation.

## Appendix C

United States District Court
Northern District of California

No. C-72 2038 ACW

Nathan S. Smith,
Plaintiff,
vs.
Commanding Officer, Air Force Accounting and Finance Center, Arthur R. Grimm and Jeannine Grimm,
Defendants.

[Filed April 8, 1974]

### JUDGMENT

The Court having heretofore filed its Findings of Fact and Conclusions of Law, renders its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Nathan S. Smith, has an equitable lien on and is entitled to recover the following:

1. All monies now being held in Crocker National Bank Account No. 018-5001690, pursuant to this Court's ORDER dated and filed herein July 20, 1973; and

2. Fifty percent (50%) of the retirement pay of a captain in the United States Air Force retired with



20 years service (computed before any withholding or deductions for income tax liabilities or any other purpose, and including all raises in retirement pay which would be received by a captain in the United States Air Force retired with 20 years service), such money to come out of whatever monies are hereafter payable on a monthly basis to Defendant Arthur R. Grimm from the Commanding Officer, United States Air Force Accounting and Finance Center, or his successor, or any other agency of the United States.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Louis N. Haas and Steven M. Kipperman, counsel for the respective parties, shall forthwith take such steps as may be required to effect the disbursement of all monies in Crocker National Bank Account No. 018-5001690 to Nathan S. Smith.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Arthur R. Grimm instruct the Commanding Officer, United States Air Force Accounting and Finance Center (or any Finance and Accounting Office of the United States which may subsequently be responsible for disbursing monies to Defendant Arthur R. Grimm) by registered mail, that henceforth, any payments for his account shall be forwarded directly to:

The Bank of California, N.A.
Collection Exchange Department
P. O. Box 45000
San Francisco, California 94145

who shall be, and hereby is, authorized and designated to endorse the payee's name on any such check, draft,

voucher, warrant or other evidence of indebtedness; who shall be kept apprised of the gross amount of the monthly retirement pay of a captain in the United States Air Force retired with 20 years service; who shall on a monthly basis immediately upon receipt of a check, draft, etc., forthwith disburse to Nathan S. Smith fifty percent (50%) of such gross amount and to the payee named thereon the balance.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that such instruction shall be irrevocable and shall remain in effect during the lifetime of Defendant Arthur R. Grimm, but shall terminate upon his death.

Plaintiff shall recover his costs from defendant Arthur R. Grimm only.

Dated: April 8, 1974

/s/ Albert C. Wollenberg
United States District Judge



## Appendix D

*In The United States District Court*
*For The Northern District of California*

Case No. 72-2038-ACW

Nathan S. Smith, Plaintiff,
vs.
Commanding Officer, etc., et al., Defendants.

[Filed Feb. 28, 1974]

### ORDER AND MEMORANDUM OF DECISION

This is an action by Nathan Smith, an attorney, to recover money allegedly owed him under a contingency fee contract executed between Smith and defendants Arthur and Jeannine Grimm. After being honorably discharged, on the ground of unfitness, from the United States Air Force with 18 years of service, Grimm retained Smith to bring an action in federal court for the purpose of setting aside the discharge. Because more than two years had elapsed since his discharge, Grimm would automatically become eligible for retirement after 20 years service if he was successful in his suit in federal court. Retirement after 20 years service would provide

Grimm and his wife, Jeannine, with retirement pay and other benefits they would not enjoy if Grimm were forced to retire after only 18 years of service.

The Grimms and Smith entered into a contingency fee contract which provided that Smith would pursue whatever federal judicial remedies were available to Grimm, and, in return, Smith would receive one-half of whatever increased benefits Grimm received as a result of Smith's efforts. Pursuant to that agreement Smith filed a suit in the United States District Court to set aside Smith's discharge. The judgment was rendered in favor of Smith was affirmed by the United States Court of Appeals for the Ninth Circuit. No further appeal was taken and the judgment became final on November 29, 1971. As a result of this judgment, Grimm became eligible for certain amounts of back pay plus retirement pay in excess of $500 per month for life. Upon Arthur Grimm's death, Jeannine will become eligible to receive a percentage of the monthly payments then being received by Arthur Grimm.

The conclusion is unavoidable that under the circumstances of this case, plaintiff Smith is entitled to recover one-half of the back pay awarded to Arthur Grimm plus one-half of the retirement pay Grimm is eligible to receive. The terms of the underlying agreement may be harsh, but they are not unconscionable and must be enforced. Whether any retirement payments will accrue to Jeannine Grimm following her husband's death, however, is speculative, and, even assuming Mrs. Grimm will outlive her husband,



the amount she would recover is too uncertain to compute.

Accordingly, IT IS ORDERED that Nathan S. Smith shall recover from Arthur R. Grimm as follows:

1) One-half of the back pay which Arthur R. Grimm became entitled to receive from the United States Air Force. 2) One-half of the payments Arthur R. Grimm will receive as a result of retiring from the United States Air Force with 20 years service, such amount to be reduced to its present value and computed on the basis of the present life expectancy of Arthur R. Grimm.

IT IS FURTHER ORDERED that plaintiff shall prepare and submit to this Court within 10 days a judgment consistent with this order. This order and memorandum of decision shall constitute findings of fact and conclusions of law pursuant to F.R.Civ.P. Rule 52(a).

Dated: February 27, 1974.

/s/ Albert C. Wollenberg
United States District Judge

## Appendix E

In the United States District Court for the Northern District of California

Case No. C-72 2038 ACW

Nathan S. Smith,
Plaintiff,
vs.
Commanding Officer, Air Force Accounting and Finance Center, Arthur R. Grimm and Jeannine Grimm,
Defendants.

[Filed April 23, 1973]

### ORDER DENYING MOTION TO DISMISS

This action was filed on November 8, 1972. Jurisdiction is alleged under 28 U.S.C. §§1331, 1361, and 2201. The essence of the claim is that plaintiff, an attorney, represented the Grimms in a federal court proceeding based on Grimm's unlawful discharge from the air force. Under a retainer agreement, plaintiff was to receive "50% of any and all amounts recovered by Clients as a direct or indirect result of said action. It is further agreed that this contract constitutes an assignment pro tanto to Attorney of said claim insofar as is lawful and of anything received or collected



thereon and of any judgment or judgments obtained thereon." The complaint alleges that the Grimms have repudiated the contract and do not intend to pay plaintiff; that the air force has computed Grimm's back pay and retirement benefits and is prepared to issue a voucher, and that it is necessary for the court to enjoin payment to Grimm, to appoint a receiver, and to declare plaintiff's rights in the contract. A temporary restraining order and preliminary injunction have already been issued to prevent the air force from sending the funds to the Grimms.

One motion to dismiss has already been filed by the United States on the grounds that plaintiff's claim is barred by the Anti-assignment Act, 31 U.S.C. §203. That motion was heard with plaintiff's argument and was impliedly denied by the granting of the preliminary injunction.

The present motion to dismiss is on behalf of the Grimms. They raise three claims.

*Failure to State a Claim.*

The Grimms contend that the retainer agreement is barred by Cal. Labor Code §300, which says: "No assignment of, or order for wages or salary, earned or to be earned, shall be valid" unless certain provisions are complied with. The two provisions allegedly violated are that the assignment be contained in a separate written instrument, and that a copy of such assignment be filed with the employer. The Grimms cite no cases indicating that these provisions are ap-

plicable to the present case. The retainer agreement is a written assignment signed by the parties to be bound. The file indicates that plaintiff did file a copy of the agreement with the air force. Hence, the relevance of §300 is unclear. The Grimms also cite *Fracasse v. Brent,* 100 Cal. Rptr. 385 (1972) for the proposition that "the cause of action to recover compensation for services rendered under a contingent fee contract does not accrue until the occurrence of the stated contingency." In this case, however, the district court and appellate court holdings in favor of the Grimms had been entered long before any alleged discharge. Hence, *Fracasse* is inapplicable.

*No Federal Question*

Defendant relies on two 9th Circuit cases for the proposition that there is no federal jurisdiction of this case. Neither is on point. *Marshall v. Desert Properties Co.,* 103 F.2d 551 (9th Cir. 1939) dealt with potentially conflicting claims of two placer miners. The only federal connection was the Federal Mining Law, 30 U.S.C. §21 et seq. *Adelt v. Richmond School District,* 439 F.2d 718 (9th Cir. 1971) was a simple contract problem between a teacher and her school district. Hence neither case is particularly helpful.

The two principal sections relied on by plaintiff are the federal question statute, 28 U.S.C. §1331, and the federal mandamus to compel a federal officer to perform his duties, §1361. The Declaratory Judgment Act, 28 U.S.C. §2201, is also cited, but the declaration



of rights would only be necessary if there is an underlying federal claim.

In essence, this is a suit for breach of contract. The federal connection comes from either or both of the following: the suit by the Grimms against the Air Force was clearly a federal action; this contract claim arises out of that action in that the services sought to be compensated were performed pursuant to a federal claim. If the claim had been raised in connection with that law suit, the court certainly would have resolved the problem. *Cf. Strachan Shipping Co. v. Melvin,* 327 F.2d 83, 84 (5th Cir. 1964).

Moreover, the federal government holds the *res;* plaintiff is not entitled to a simple money judgment, but to one-half of the proceeds of the prior litigation. Hence, we have a federal defendant who is a stakeholder. The cases plaintiff cites seem to support jurisdiction along this theory, but none is precisely on point, and all are very old. Because this issue was raised by the United States on its motion, and is presently before the Court of Appeals, the Court denies the motion to dismiss for lack of jurisdiction pending a decision by the Ninth Circuit.

*Forum Non Conveniens*

The Grimms' final contention is that they should be dismissed as defendants on grounds of forum non conveniens. This contention is clearly frivolous, since the Grimms are the real parties in interest. As plaintiff points out, "Where the purpose of the suit is the

disposition of a fund . . . to which there are several claimants, all of the claimants are generally indispensible." 3 MOORE'S ¶19.09, p. 2291.

*CONCLUSION*

The motion to dismiss is accordingly DENIED.

Dated: April 24, 1973

Albert C. Wollenberg
United States District Judge



## Appendix F

United States District Court
Northern District of California

No. C-72-2038 ACW

Nathan S. Smith,
Plaintiff,
vs.
Commanding Officer, Air Force Accounting and Finance Center, Arthur R. Grimm and Jeannine Grimm,
Defendants.

[Filed Sept. 7, 1976]

JUDGMENT

Upon remand from the Court of Appeals for the Ninth Circuit, this action came before the Court, Honorable Albert C. Wollenberg, District Judge, presiding. The issues having been duly presented by the parties, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff take nothing and that, pursuant to the order of remand of the Court of Appeals of April 13, 1976, the action be DISMISSED.

Dated: September 7, 1976.

/s/ Albert C. Wollenberg
Albert C. Wollenberg
United States District Judge

## Appendix G

United States District Court
Northern District of California

No. C-72-2038 ACW

Nathan S. Smith,
Plaintiff,
vs.
Commanding Officer, Air Force Accounting and Finance Center, Arthur R. Grimm and Jeannine Grimm,
Defendants.

[Filed Sept. 7, 1976]

### ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT AND DISMISSING ACTION

After defendant Grimm appealed from this Court's original disposition of the case, the Court of Appeals reversed and remanded "with instructions to dismiss the complaint because of lack of federal jurisdiction." *Smith v. Grimm,* 534 F.2d 1346, 1353 (9th Cir. 1976). Plaintiff Smith's petition for rehearing was denied and his suggestion for a rehearing en banc was rejected. In the order denying the petition for rehearing, the Court of Appeals stated that:

> Nothing in this Order is intended to preclude such amendment of allegations of federal jurisdiction as the trial court may deem proper. Rule 5(a) Fed. R. Civ. P.; 28 U.S.C. §1653.[1]



Presently before the Court is plaintiff's motion to amend his complaint.

Plaintiff now alleges several sources of jurisdiction. He asserts in the proposed amendments to his complaint that there is federal question jurisdiction pursuant to 28 U.S.C. §1331 because his claim arises under the due process and just compensation clauses of the Fifth Amendment and under 37 U.S.C. §701 (a). Jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§701-703, is also alleged. Finally, plaintiff asserts mandamus jurisdiction based on supposed duties owed by the government defendant to plaintiff under the Fifth Amendment and 37 U.S.C. §701(a).

The relief sought in the original complaint is described by the Court of Appeals in the following terms:

> [The complaint] asks for the declaration of an equitable lien, the appointment of a temporary receiver for the funds, and an injunction requiring the moneys to be paid to the receiver. 534 F.2d at 1350.

The Court of Appeals went on to state that "Smith's claim of the existence of an equitable lien does not provide federal question jurisdiction" and that "state law, not federal common law, . . . determines the existence of an equitable lien under the circumstances

[1]The order denying the petition for rehearing was not published. It is attached to plaintiff's notice of motion filed May 25, 1976.

of this case." *Id.* at 1351. That being the case, Smith's claim of an equitable lien cannot "arise under" the Fifth Amendment or 37 U.S.C. § 701(a). Mandamus jurisdiction fails for the reasons previously stated by the Court of Appeals. *Id.* at 1352. Since no action by a government official that is alleged in either the original complaint or the proposed amended complaint is relevant to the question of the existence of the equitable lien under California law, the subject matter jurisdiction to review agency actions that is embodied in the Administrative Procedure Act is irrelevant to plaintiff's case.

In addition to alleging the existence of an equitable lien, the original complaint alleged that the contract between Smith and Grimm contained an "assignment" and sought a court order "confirming said assignment".[2] As part of the proposed amendments to the complaint, it is alleged that the government defendant has ignored "plaintiff's rights as an assignee and as an equitable lienholder." In four paragraphs that plaintiffs proposes to add to his complaint, he alleges that the government defendant has acted beyond his statutory powers and in an unconstitutional manner by ignoring these rights and that the government defendant has a duty to recognize these rights.[3] For several reasons, these allegations cannot be used to restore federal jurisdiction over this lawsuit.

It is clear that 37 U.S.C. § 701(a) has nothing to do with equitable liens. Mandamus jurisdiction based on

[2]Complaint filed November 8, 1972, ¶¶VIII, XII.

[3]Amended complaint paragraphs X-A through X-D.



an alleged duty under the Fifth Amendment to recognize the equitable lien has already been ruled out by the Court of Appeals. Making explicit the basis of the allegation of a duty that the Court of Appeals was willing to infer for the sake of argument cannot avoid the application of the appellate court's reasoning. See 534 F.2d at 1352 (last paragraph).

Furthermore, under California law an equitable lien is not cognizable until a court judgment declares its existence. *People v. One 1960 Ford,* 228 Cal.App. 2d 571, 577, 39 Cal. Rptr. 636, 640 (1964), and cases cited therein. Since the purpose of this action was to establish the existence of an equitable lien, the government defendant could not have been charged with failing to recognize Smith's lien prior to the filing of the lawsuit. No claim therefore arises under the Fifth Amendment nor is there any government action in connection with an equitable lien that is reviewable under the Administrative Procedure Act. Consequently, the proposed amended complaint still fails to establish a federal jurisdictional basis for plaintiff's claim of an equitable lien.

Another area for consideration is plaintiff's claim that the government defendant improperly failed to recognize Grimm's assignment of money obtained as a result of Smith's legal efforts on Grimm's behalf. Under this theory, 37 U.S.C. § 701(a) becomes relevant. That statute provides that:

> Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the

> Army or the Air Force may transfer or assign his pay account, when due and payable.

However, the purported assignment in this case is invalidated by the Anti-Assignment Act, 31 U.S.C. § 203, which covers "all transfers and assignments" because, *inter alia,* the assignment was not made "after the allowance of the claim . . . and the issuing of a warrant for the payment thereof." While the agreement may have created an equitable lien, it cannot be considered a valid assignment of a claim against the United States. Cf. *In re Freeman,* 480 F.2d 431 (9th Cir. 1973).[4] Technically, it may be possible to say that this version of plaintiff's case arises under 37 U.S.C. § 701(a) because in order for him to recover it must be determined that he can maintain a private right of action under that statute. In the context of this case, however, that question is not central because of the clear invalidity of the assignment. Any question arising under the Fifth Amendment is similarly collateral.

Although it is not mentioned in plaintiff's proposed amendments to his complaint, one of plaintiff's briefs puts forward the idea that he has a cause of action arising under 37 U.S.C. § 701(d) and the regulations relating to that statute. However, the complaint does not allege that any allotment pursuant to that statute had been made by Grimm, so no substantial federal question has been set forth. Plaintiff asserts that this

[4]The Court of Appeals has already determined that the question of the operation of the Anti-Assignment Act with respect to plaintiff's equitable lien theory does not create federal jurisdiction.



Court's previous judgment ordered Grimm to submit the appropriate allotment instructions to the Air Force. However, the Court of Appeals has determined that there was no jurisdiction to enter that judgment. Furthermore, plaintiff cannot bootstrap a possible form of remedy on his state law cause of action into establishing federal question jurisdiction.

Finally, even if plaintiff's assignment theory is cognizable under one or more of the alleged jurisdictional bases, plaintiff could not prevail on the merits of his substantive claim against the government defendant. "An amendment designed to raise a federal question, and thereby to create a case cognizable by the federal courts, will not be permitted unless it appears that it will likely avail [the party seeking the amendment]." *Brennan v. University of Kansas,* 451 F.2d 1287, 1289 (10th Cir. 1971).[5]

ACCORDINGLY, IT IS HEREBY ORDERED that plaintiff's motion to amend the complaint is hereby DENIED and that the action is hereby DISMISSED.

Dated: September 7, 1976.

/s/ Albert C. Wollenberg
Albert C. Wollenberg
United States District Judge

[5]It is therefore unnecessary to discuss the other theories set forth by defendants in opposing plaintiff's motion. It should be noted, however, that the Court of Appeals apparently did not consider the government to have waived any claims of sovereign immunity. There has certainly been no such waiver with respect to the proposed amended complaint.

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1976

## No. 76-521

NATHAN S. SMITH
*Petitioner,*

vs.

ARTHUR R. GRIMM and JEANNINE GRIMM,
*Respondents.*

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
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Respondents Arthur R. and Jeannine Grimm respectfully pray that the Petition for a Writ of Certiorari herein be denied.

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### INTRODUCTION

Petitioner seeks to bring within the jurisdiction of the federal courts a simple contract dispute over a contingent fee agreement between an attorney and his clients. In finding no federal jurisdiction, the

Ninth Circuit correctly sized up the tenor of the instant case as follows:

> At bottom, this is a simple contract dispute between Smith and Grimm. Smith wants to collect his contingent fee; Grimm defends upon the grounds of unconscionability and non-performance. These issues of state law predominate. The role of the Air Force in this case is merely that of the contract debtor. 534 F.2d 1346, 1349 (9th Cir. 1976).

An examination of the petition herein can result in only one conclusion—the requisite considerations governing review on certiorari dictated by Rule 19, Supreme Court Rules, have not been met.

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**PETITIONER'S ERRONEOUS GROUNDS OF JURISDICTION**

The Ninth Circuit's decision is well reasoned and exhaustive, and works no injustice or hardship on attorneys seeking to collect their fees for services rendered to clients on federal matters. In the instant case, state court remedies are readily available, and, as the Ninth Circuit correctly pointed out, a state court can do anything a federal court could do in the instant case. In fact, petitioner has now filed his cause in state court and has secured precisely the same preliminary injunction he obtained in federal district court. *Smith v. Grimm,* Superior Court of the State of California, City and County of San Francisco, Action No. 712 033.



**1. THERE IS NO FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. §1331(a)**

Petitioner erroneously states that the Ninth Circuit "has subordinated the totally federal context in which this claim was asserted—i.e., a claim against federal funds held by federal officers to satisfy a judicially approved judgment against the United States" (Petition, page 13). There are no specific federal funds held by federal officers that petitioner can point to in the instant case. Even without considering the barrier posed by the Anti-Assignment Statute, 31 U.S.C. §203, petitioner's claim is rooted in state law and a state court can afford all the relief available in a federal court.

*Houston v. Ormes,* 252 U.S. 469 (1920) is totally inapplicable to the instant case. Aside from the fact that *Houston* was in reality a "state court" case falling into the federal ambit under the old judicial scheme for the District of Columbia (admitted by petitioner in his petition, page 14), jurisdiction could have only been asserted therein because a specific fund had been appropriated by Congress for payment to a specified person in satisfaction of a finding made by the Court of Claims. The key to the instant case is that petitioner can point to no such special fund appropriated for his client by Congress. Rather, Arthur Grimm was and will be paid out of the general appropriations for the Defense Department made on an annual basis (see e.g. Department of Defense Appropriations Action, Public Law 92-570, 86 Stat. 1184-1189).

### 2. THERE IS NO MANDAMUS JURISDICTION UNDER 28 U.S.C. §1361

For the same reasons adduced above, *Houston* affords no basis for mandamus jurisdiction. The Ninth Circuit was absolutely correct in its holding that the claim against the public officer involved was not clear and certain and the duty of the officer not ministerial.

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### 3. SOVEREIGN IMMUNITY

Sovereign immunity was not waived in the instant case, and does pose a real barrier to federal jurisdiction. As the district court noted in denying plaintiff's (petitioner's) motion to amend his complaint and in dismissing the action, the Ninth Circuit "apparently did not consider the government to have waived any claims of sovereign immunity. There has certainly been no such waiver with respect to the proposed amended complaint" (Petition, Appendix G, page xxxi).

Of most importance is the fact that the sovereign immunity barrier was an alternate ground for the Ninth Circuit's decision. Petitioner recognizes this fact on page 18 of his petition ("While sovereign immunity partakes of jurisdiction, it *may* not be the type of jurisdictional matter than can be raised sua sponte by a court. . . .") and yet asks this Court to grant certiorari on the basis of suc'. a remote and speculative question.



### THE WRIT SHOULD NOT BE GRANTED

In quoting from *Gully v. First National in Meridian,* 299 U.S. 109, 118 (1936), the Ninth Circuit correctly recognized the lack of a federal claim in the instant case and the dangers inherent in positing jurisdiction (534 F.2d 1350).

Without question during the judicial history of our nation, hundreds of thousands of servicemen have become embroiled in disputes over fees charged by their lawyers. Nevertheless, petitioner cannot point to one case under which a federal court has ordered a military department to pay directly any due portion of pay and allowances owing a serviceman to his attorney, under the equitable lien theory or any other. Unlike other congressional appropriations, Department of Defense appropriations for military pay and allowances are strictly regulated by a scheme of federal statutes and implementing regulations. With a few narrow exceptions totally inapplicable to the instant case, the only deductions allowable from a serviceman's pay are listed in 37 U.S.C. §1007. Payments to an attorney owed fees, or any equitable lien holder, are not included among deductions allowable. The applicability of the equitable lien theory to attorneys of servicemen would wreak havoc on the tightly knit statutory scheme of military finance and accounting. Accordingly, this petition must not be granted.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should not be granted.

Dated, November 3, 1976.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-521**

NATHAN S. SMITH,
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v.

ARTHUR R. GRIMM and JEANNINE GRIMM,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONER'S REPLY BRIEF

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The main reason why certiorari should be granted is to determine the impact of *Houston* v. *Ormes*, 252 U.S. 469 (1920), on the jurisdictional factors resolved here by the Ninth Circuit. Although that decision was thoroughly briefed before the Ninth Circuit, the court did not see fit to recognize or distinguish the *Houston* case—perhaps because the court could not distinguish it.

The important fact remains that the *Houston* decision appears to contradict the Ninth Circuit's ruling on all jurisdictional points, i.e., *Houston* arguably indicates that there is a federal question in this case, that there is a basis for asserting mandamus against a federal officer, and that sovereign immunity is not available as a defense. The respondents' Opposition (p. 3) attempts to distinguish *Houston* on the ground that it was bottomed on a specific appropriation by Congress, whereas the respondent Grimm "was and will be paid out of the general appropriations for the Defense Department."[1] And the respondents add (Opp. p.5) that the appropriations for military pay and allowances are "strictly regulated by a scheme of federal statutes and implementing regulations," which purportedly do not permit recognition of an attorney's equitable lien.[2]

[1] Respondents' attempted distinction of the *Houston* case on this ground is belied by the Solicitor General's brief (p. 7) in that case, which pointed out that the appropriation in *Houston* was "made payable 'out of any money in the Treasury not otherwise appropriated' [and] segregates no special funds of the Government." This Court accepted that description of the *Houston* appropriation, which thus becomes markedly similar to the general appropriations involved in the instant case.

[2] In support of that contention, the respondents (Opp., p. 5) point to 37 U.S.C. § 1007, listing deductions that can be made from the pay of members of the armed forces—which does not specifically mention deductions inspired by equitable liens. But § 1007 must be read in conjunction with Part 6 of the Defense Department Pay Manual, which authorizes military service men to allocate their pay to "banking institutions for credit to the account of another." Also relevant is 37 U.S.C. § 701(a), which contemplates that, pursuant to regulations, a commissioned officer of the Air Force "may transfer or assign his pay account, when due and payable." Thus the original decision by the District Court below, enforcing the equitable lien, is entirely consistent with the "scheme of federal statutes and implementing regulations." Opp. p. 5.



But these arguments, quite apart from their intrinsic inadequacies, serve mainly to emphasize the federal nature of this case and to add certiorari fuel to the controversy over the present-day vitality and meaning of the *Houston* principles. Is *Houston* totally different from this case? Should the *Houston* ruling be ignored when federal question jurisdiction and federal officer mandamus jurisdiction are invoked to enforce an attorney's equitable lien against a federal fund held by federal officers? Should the doctrine of sovereign immunity be gratuitously raised in circumstances where *Houston* said it was inapplicable?

The only other thesis in the Opposition (p. 2) is that federal jurisdiction need not be used here since "a state court can do anything a federal court could do in the instant case." That assertion is patently unsound, for a state court could never do what the federal district court tried to do in this case—give petitioner a judgment binding on the Air Force and a declaration that the federal funds in question are subject to the valid equitable lien. A state court can only give petitioner the rather limited protection of an *in personam* judgment against the Grimms.

But the adequacy or inadequacy of the state court remedies has no bearing on the propriety of invoking federal jurisdiction in this case. If there is federal jurisdiction, petitioner is entitled to invoke it. The unanswered question is whether the *Houston* decision commands the federal courts to take jurisdiction over "a simple contract dispute between Smith and Grimm" that is inescapably entwined with federal factors.

## CONCLUSION

Respondents' Opposition has in no way diluted the appropriateness of granting certiorari. The basic question finds no answer in federal jurisprudence. Do the principles established in 1920 in *Houston* v. *Ormes* apply as well in 1976? This Court has never confronted that question. Because of the involvement of the United States in the District Court proceedings below, this Court may wish to consider inviting the views of the United States on this important question.

Respectfully submitted,

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